



# EMPLOYER BEWARE- A STUDY ON LAW RELATING TO WORK PLACE RELATED SEXUAL HARASSMENT IN INDIA

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## ABSTRACT

Self-learning Materials (SLM) play a major role in the teaching-learning process at all levels of education and training. As often many of the learners pursuing teacher education programme in special education through open and distance mode of learning. The article sought the opinion of the learners on the preciseness of the study material catered to them. Preciseness as defined in this study is the comprehensibility of the material in use. Both academic and physical aspects of self-learning material have been studied. The academic aspects include selection, organization and presentation of content with an overview of language, pacing, illustration, exercise & assignments. Whereas physical aspects of self-learning materials include printing, lay-out & get-up, durability, and size. This particular section of the stake holders were chose to deep deal in learner friendliness of the material. The sampling was incidental-purposeful and a descriptive survey method was used.

**KEY WORDS:** Special education training programme, Self-learning material, open distance learning.

## Introduction

*"In most parts of the world, when a girl is born...her wings are clipped -- she's not allowed to fly."*<sup>3</sup>

Gender equality as generally believed is not a 'women's issue', but refers to the equal rights, responsibilities and opportunities of women and men, girls and boys, and should concern and fully engage men as well as women. Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right.

Principles of Gender equality is guaranteed in the Indian Constitution, which assures "Equality of status and of opportunity".<sup>4</sup> These rights guarantees a person's right to live free of any discrimination on any ground, be it race, religion, caste, sex, place of birth and protects life and personal liberty. Discrimination against women violates the principles of equality of rights and respect for human dignity. It stands as an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.<sup>5</sup>

There is a strong commitment to equality between women and men in international human rights law. Article 2 of the Universal Declaration of Human Rights (UDHR) provides that every human being is entitled to all the rights and freedoms within the Declaration 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Similarly, the International Covenant on Civil and Political Rights (ICCPR) requires States to respect and ensure the rights in the Covenant 'without distinction'. The International Covenant on Economic Social and Cultural Rights (ICESCR) requires State parties to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind on the grounds mentioned in the UDHR. The UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) calls for the equality of women and men in terms of human rights and fundamental freedoms in the political, economic, social, cultural and civil spheres.

An undisturbed, safe and secure place of work is therefore a woman's Human and Constitutional right<sup>6</sup>. One of the logical consequences of sexual harassment in work place is violation of the victim's fundamental right under Article 19(1)(g) 'to practice any profession or to carry out any occupation, trade or business'. Availability of a "safe" working environment is the most essential element of this fundamental right to carry on any occupation, trade or profession.

## MATERIALS AND METHODS

In this background, this paper aims to trace the historical background of the act, put forward a detail description of the enactment and the implications thereto, and analyse the merits and demerits of the Act. The Act uses a doctrinal research methodology to arrive at the research findings.

## GENESIS OF THE LEGAL RECOGNITION

Sexual harassment of women is not a new trend. It has existed worldwide for ages. The trigger to the development of law on sexual harassment in India was in the case of Vishaka v. State of Rajasthan. It was a class action by certain social activists and NGOs with the aim of focusing attention towards this societal

aberration, and assisting in finding suitable methods for realization of the true concept of 'gender equality'; and to prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation.<sup>9</sup>

It all happened in 1992, Bhanwari Devi, a woman employed with the rural development programme of the Government of Rajasthan was brutally gang raped on account of her efforts to curb the then prevalent practice of child marriage. This incident revealed the toil a woman has to undergo at workplace. The incident revealed the hazards to which a working woman was exposed too. The Court in the absence of legislative measures, felt a need to bring about an alternative mechanism to fill the existing gap. The Indian Supreme Court of India's landmark judgment in Vishaka and others v. State of Rajasthan<sup>10</sup> laid down guidelines making it mandatory for every employer to provide a mechanism to redress grievances pertaining to workplace sexual harassment and enforce the right to gender equality of working women. The court said<sup>11</sup>

"In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution... The executive power of the Union<sup>12</sup> is, therefore, available till the parliament enacts to expressly provide measures needed to curb the evil."

## LEGISLATIVE FRAMEWORK

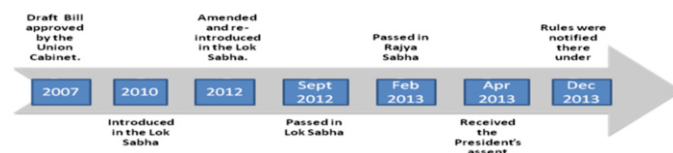
The Hon'ble Supreme Court of India in the landmark case of Vishaka V. State of Rajasthan gave detailed guidelines on Sexual harassment in workplace. Post Vishaka Judgment there was an overall dissatisfaction among civil societies that Vishaka Guidelines were not strictly adhered too and the standard response was to terminate service of the women employees following complaints of sexual harassment. The Supreme Court of India expressed concern over poor implementation of the Vishakhia guidelines in Medha Kotwal vs. Union of India<sup>13</sup>. The Judgement referred to the affidavits filed by the state governments about steps taken by them to implement the Vishakhia guidelines. These replies disclosed substantial non-compliance with the Vishakhia guidelines. Taking cognisance of this fact, the Supreme Court reiterated its directions in the judgment, with special reference to nursing homes, law, architect, and engineering firms. It directed statutory institutes to ensure that the organisations, bodies, associations, institutions, and persons registered/affiliated followed the Vishakhia guidelines.

Similarly a Joint Parliamentary Committee (JPC) report (2011) that reviewed the Sexual Harassment Bill, 2010 summarised the issue. It recorded that absence of a central mechanism i.e. no database with the Ministry of Women and Child development on the number of complaints of sexual harassment, their resolution, and the action taken, especially in the private sector. As a consequence, the JPC said extent of implementation of the Vishakhia guidelines in the private sector could not be ascertained. In conclusion the JPC said that in the absence of penal provi-

sions for non compliance, compliance by employers in the private sector could be lax, and that the Supreme Court's guidelines probably remained on paper in a majority of workplaces.

Sexual Harassment of Women At Workplace (Prevention, Prohibition and Redressal) Act, 2013<sup>14</sup> aims to provide protection against sexual harassment of women at workplace throughout India and to prevent and redress complaints of sexual harassment and for matters connected therewith.

The following diagram gives the legislative timeline of the Act-



## SEXUAL HARASSMENT BASIC CONCEPTS

### • Sexual Harassment- Defined

The Act defines Sexual harassment one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely-

- physical contact and advances; or
- a demand or request for sexual favours; or
- making sexually coloured remarks; or
- showing pornography; or
- any other unwelcome physical, verbal or nonverbal conduct of sexual nature

According to Section 3(2) Presence or occurrence of circumstances of implied or explicit promise of preferential treatment in employment; threat of detrimental treatment in employment; threat about present or future employment; interference with work or creating an intimidating or offensive or hostile work environment; or humiliating treatment likely to affect the lady employee's health or safety could also amount to sexual harassment.

The words "unwelcome" in the definition of Sexual harassment is quiet subjective. In *Dr. Punita K. Sodhi v. Union of India & Ors.*<sup>15</sup> the High Court of Delhi endorsed the view that sexual harassment is a subjective experience and held "We therefore prefer to analyze harassment from the [complainant's] perspective. A complete understanding of the [complainant's] view requires...an analysis of the different perspectives of men and women. Conduct that many men consider not objectionable may offend many women... Men tend to view some forms of sexual harassment as "harmless social interactions to which only overly-sensitive women would object. The characteristically male view depicts sexual harassment as comparatively harmless amusement... Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive."

The Act puts a direct prohibition to Sexual harassment under Section 3 directing that no woman shall be subjected to sexual harassment at any workplace.

The sex of the respondent is not relevant. In, *Apparel Export Promotion Council Vs. A.K. Chopra*, the Hon'ble Supreme Court while deciding an issue whether the act of a superior officer (wherein such superior officer tried to molest his junior woman employee) would amount to sexual harassment, the Court relied on the definition of the term 'sexual harassment' laid down by the Supreme Court in the *Vishaka Judgment* (which is similar to the definition of the Sexual Harassment provided in the Act) held that "the act of the respondent was unbecomingly of good conduct and behavior expected from a superior officer and undoubtedly amounted to sexual harassment..."

### • Workplace

The Act applies to both organized and un organized sector.

"Workplace" includes<sup>17</sup> government bodies, private and public sector organisations, non-governmental organisations, organisations carrying out commercial, vocational, educational, entertainment, industrial, financial activities, hospitals and nursing homes, educational institutes, sports institutions and stadiums used for training individuals and a dwelling place or a house.

The Act introduces a concept of extended "Work place" whereby any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey.

### • Whom does the Act Protect?

The act protects every woman (of any age) who alleges sexual harassment against the respondent, whether employed or otherwise. The Act defines an Employee as

a woman who is employed at a workplace for any work

on regular, temporary, ad hoc or daily wage basis,

either directly or through an agent, including a contractor,

with or, without the knowledge of the principal employer,

whether for remuneration or not, or working on a voluntary basis or otherwise,

whether the terms of employment are express or implied and

includes a co-worker, a contract worker, probationer, trainee, apprentice or called by any other such name;

## THE GRIEVANCE REDRESSAL MECHANISM UNDER THE ACT

The Act requires the employer to appoint an Internal Complaints committee and the government to appoint at district level Local complaints committee

The Prevention of Workplace Sexual Harassment Act requires an employer to set up an 'internal complaints committee' ("ICC") at each office or branch, of an organization employing 10 or more employees, to hear and redress grievances pertaining to sexual harassment.

The committee shall consist of a Presiding officer: who shall be & woman employed at a senior level at workplace from amongst the employees

Not less than two Members from amongst employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge

one member from amongst non-governmental organisations or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment:

At least one-half of the total Members so nominated shall be women. The Presiding Officer and every Member of the Internal Committee shall hold office for such period, not exceeding three years, from the date of their nomination as may be specified by the employer. Members from amongst the non-governmental organisations or associations shall be paid such fees or allowances for holding the proceedings of the internal committee by the employer as may be prescribed.

At the district level, the Government is required<sup>20</sup> to set up a 'local complaints committee' ("LCC") to investigate and redress complaints of sexual harassment from the unorganized sector or from establishments where the ICC has not been constituted on account of the establishment having less than 10 employees or if the complaint is against the employer.

The Prevention of Workplace Sexual Harassment Act stipulates that the ICC and LCC shall, while inquiring into a complaint of workplace sexual harassment, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 when trying a suit in respect of:

- summoning and enforcing the attendance of any person and examining him on oath;
- requiring the discovery and production of documents; and
- any other matter which may be prescribed

## THE COMPLAINT MECHANISM

An aggrieved woman who intends to file a complaint is required to submit six copies of the written complaint, along with supporting documents and names and addresses of the witnesses to the ICC or LCC, within 3 months from the date of the sexual harassment incident and in case of a series of incidents, within a period of 3 months from the date of the last incident.

The ICC/ LCC is at an option to extend the timeline for filing the complaint, for reasons to be recorded in writing, by a period of 3 months. The law also makes provisions for friends, relatives, co-workers, psychologist, psychiatrists, etc. to file the complaint in situations where the aggrieved employee is unable to make the complaint on account of physical incapacity, mental incapacity or death.<sup>22</sup>

### • What are the Contents of the complaint?

The written complaint should contain a description of each incident(s). It should include relevant dates, timings and locations; name of the respondent(s); and the working relationship between the parties. A person designated to manage the workplace sexual harassment complaint is required to provide assistance in writing of the complaint if the complainant seeks it for any reason.

### • What is the Redressal Process ?

The Committee is required to complete the inquiry within a time period of 90 days. On completion of the inquiry, the report will be sent to the employer or the

District Officer, as the case may be, they are mandated to take action on the report within 60 days.

In case of a domestic worker, the Local Committee shall, if prima facie case exist, forward the complaint to the police, within a period of seven days for registering the case under Section 509 of the Indian Penal Code (45 of 1860).]

An aggrieved woman is allowed to request for conciliation in order to settle the matter although monetary settlement should not be made as a basis of conciliation.<sup>23</sup>

All the proceeding of the committee shall be recorded in writing. The record of the proceeding and the statements of witnesses shall be endorsed by the persons concerned in token authenticity thereof. All persons heard by the committee as well as observers/ nominees, shall take and observe an oath of secrecy about the proceedings to protect the dignity of the complainant and the defendant. Any violation of the oath of secrecy may invite penalties

#### • What Interim Reliefs can be ordered by ICC/LCC?

The ICC/LCC is also empowered to, at the request of the complainant, recommend to the employer interim measures such as:

- i. transfer of the aggrieved woman or the respondent to any other workplace
  - ii. granting leave to the aggrieved woman up to a period of 3 months in addition to her regular statutory/ contractual leave entitlement
  - iii. restrain the respondent from reporting on the work performance of the aggrieved woman or writing her confidential report, which duties may be transferred to other employees.
- What Punishment can be imposed by an Employer on an employee indulging in an act of sexual harassment?

The statute prescribes the following punishments that may be imposed by an employer on an employee for indulging in an act of sexual harassment:

- punishment prescribed under the service rules of the organization;
- if the organization does not have service rules, disciplinary action including written apology, warning, reprimand, censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from service, undergoing a counselling session, or carrying out community service; and
- iii. deduction of compensation payable to the aggrieved woman from the wages of the respondent.<sup>24</sup>

The statute also envisages payment of compensation to the aggrieved woman. The compensation payable shall be determined based on:

- the mental trauma, pain, suffering and emotional distress caused to the aggrieved employee;
- the loss in career opportunity due to the incident of sexual harassment;
- medical expenses incurred by the victim for physical/ psychiatric treatment;
- the income and status of the alleged perpetrator; and
- feasibility of such payment in lump sum or in installments.<sup>25</sup>

In the event that the respondent fails to pay the aforesaid sum, ICC may forward the order for recovery of the sum as an arrear of land revenue to the concerned District Officer.

Whosoever does any shameful act which amounts to sexual Harassment at workplace will be punished under section 509 of the Indian Penal Code with a simple imprisonment for a term which may extend to three years, or with fine , or with both.

#### DUTIES OF THE EMPLOYER THAT ARE STIPULATED UNDER THE ACT

Section 19 of the Act imposes a set of duties for the employer. They are summarised below:

The Act imposes a duty on an employer to create an environment which is free from sexual harassment.

Employers are required to create awareness among employees by organizing workshops and awareness programmes at regular intervals for sensitizing the employees. The employer shall display the provision of the Act and display notices regarding the constitution of Internal Committee, penal consequences of sexual harassment etc.

Every employer of a workplace shall, by an order in writing, constitute a Committee to be known as the Internal Complaints Committee. Provide a safe working environment at the workplace which shall include safety from the persons coming into contact at the workplace; Sexual harassment at Workplace. Display at any conspicuous place in the workplace, the penal consequences of sexual harassments: and the order constituting, the Internal Complaint Committee; Organise workshops and awareness programmes at regular intervals for sensitizing the employees with the provisions of the Act and orientation programmes for the members of the Internal Committee in the manner as may be prescribed; Provide necessary facilities to the Internal Committee or the Local Committee, as the case may be, for dealing with the complaint and conducting an inquiry; Assist in securing the attendance of respondent and witnesses before the Internal Committee or the Local Committee, as the case may be; Make available such information to the Internal Committee or the Local Committee, as the case may be, as it may require having regard to the complaint made under the Act; Provide assistance to the woman if she so chooses to file a complaint in relation to the offence under the Indian Penal Code(45 of 1860) or any other law for the time being in force; Cause to initiate action, under the Indian Penal Code(45 of 1860) or any other law for the time being in force, against the perpetrator, or if the aggrieved woman so desires, where the perpetrator is not an employee, in the workplace at which the incident of sexual harassment took place; Treat sexual harassment as a misconduct under the service rules and initiate action such misconduct; Monitor the timely submission of reports by the Internal Committee.<sup>26</sup>

#### RIGHTS OF THE EMPLOYEES UNDER THE ACT

The Act protects a woman against sexual harassment in workplace. The following rights are important..A Safe working environment at the workplace which shall include safety from the persons coming into contact at the workplace. Display at any conspicuous place in the workplace, the repercussions of the sexual harassment. Provide assistance to the woman if she chooses to file a complaint in relation to the offence under the Indian Penal Code or any other law for the time being in force. Provide necessary facilities to the Internal Committee or the Local Committee, as the case may be, for dealing with the complaint and conducting an inquiry.

#### MISCELLANEOUS PROVISIONS

##### • How does the Act tackle Frivolous Complaints ?

In order to ensure that the protections envisaged under the Prevention of Workplace Sexual Harassment Act are not misused, provisions for action against "false or malicious" complainants have been included in the statute. The statute provides that if the ICC/ LCC concludes that the allegation is false or malicious or the complaint has been made knowing it to be untrue or forged or misleading information has been provided during the inquiry, disciplinary action in accordance with the service rules of the organisation can be taken against such complainant. Where the organisation does not have service rules, the statute provides that disciplinary action such as written apology, warning, reprimand, censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from service, undergoing a counselling session, or carrying out community service may be taken. The statute further clarifies that the mere inability to substantiate a complaint or provide adequate proof need not mean that the complaint is false or malicious.<sup>27</sup>

##### • How does the Act ensure Confidentiality?

Recognising the sensitivity attached to matters pertaining to sexual harassment, the Prevention of Workplace Sexual Harassment Act attaches significant importance to ensuring that the complaint and connected information are kept confidential. The statute specifically stipulates that information pertaining to workplace sexual harassment shall not be subject to the provisions of the Right to Information Act, 2005. The statute further prohibits dissemination of the contents of the complaint, the identity and addresses of the complainant, respondent witnesses, any information relating to conciliation and inquiry proceedings, recommendations of the ICC/LCC and the action taken to the public, press and media in any manner. That said, the statute allows dissemination of information pertaining to the justice that has been secured to any victim of sexual harassment, without disclosing the name, address, identity or any other particulars which could result in the identification of the complainant or the witnesses.<sup>28</sup>

Breach of the obligation to maintain confidentiality by a person entrusted with the duty to handle or deal with the complaint or conduct the inquiry, or make recommendations or take actions under the statute, is punishable in accordance with the provisions of the service rules applicable to the said person or where no such service rules exist, a fine of INR 5,000.<sup>29</sup>

##### • What happens if an employer fails to constitute an ICC?

If an employer fails to constitute an ICC or does not comply with the requirements prescribed under the Prevention of Workplace Sexual Harassment Act, a monetary penalty of up to INR 50,000 (approx. US\$ 900) may be imposed. A repetition of the same offence could result in the punishment being doubled and / or de-registration of the entity or revocation of any statutory business licenses. It is however unclear as to which business licenses are being referred to in this case.<sup>30</sup> It is also pertinent to note that all offences under Prevention of Workplace Sexual Harassment Act are non-cognizable.<sup>31</sup>

**FINDINGS**

The Sexual Harassment Act is a much awaited development and a significant step towards ensuring women a safe and healthy work environment.

The Sexual Harassment Act only addresses the issue of protection of women employees and is not gender neutral. Male employees, if subjected to sexual harassment, cannot claim protection or relief under the law. The definition of 'aggrieved woman' does not make a reference to victimization (on the part of the employer) of the employee who has made the complaint of harassment, which would be fairly common in such situations. This was in fact an important recommendation of the Standing Committee. The definition of the 'sexual harassment', the words 'verbal, textual, physical, graphic or electronic actions' should have been added in order for the purposes of clarity, as it would cover some of the technological developments.

It may become a challenge for employers to constitute an ICC at "all administrative units or offices". It may also become necessary for the employer to spend more time and efforts in training members of the ICC who are to be replaced every 3 years. There is also a lack of clarity as to who shall be a chairperson of the ICC in absence of a senior level female employee. Also, in such cases, the composition of the committee members should ideally have been an odd number in order for the committee to arrive at a decision based on majority. The ICC also needs to involve a member from "amongst non-governmental organisations or associations committed to the cause of women or who have had experience in social work or have legal knowledge." Employers may not be comfortable with such an external representation, considering the sensitivities surrounding this issue and the need to maintain strict confidentiality. The law casts an obligation upon the employer to address the grievances in respect of sexual harassment at workplace in a time bound manner, which in several cases may not be practically possible as the employees or witnesses involved may not easily or readily co-operate. The law allows the employer to initiate action against the complainant in case of a false or malicious complaint. This provision, although meant to protect the employer's interests, is likely to deter victims from reporting such incidents and filing complaints, which may in turn defeat the purpose for which the law was enacted. In case the allegation has been proved, the Sexual Harassment Act allows the ICC to recommend to the employer to deduct from the respondent's salary such sums it may consider appropriate to be paid to the aggrieved woman. However, there may need to be made certain corresponding changes to the Payment of Wages Act, 1936 of India, which restricts the nature of deductions that may be made from an employee's salary.

The Sexual Harassment Act does not stipulate any monetary liability on the employer in case of harassment on the part of an employee against another female employee. Infact, in developed countries like the US, although there is no codified law on sexual harassment or workplace harassment, based on case law that prohibit workplace discrimination, there is vicarious liability cast upon the employer in certain cases.

**CONCLUSION**

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 is only an old wine in a new bottle. It was expected to have made an overhaul of the law, but it severely failed. The Act has minimal victim friendly provisions and poses problems for the victim at each and every step. The Act with all the de-merits is a wonderful piece of legislation and a step ahead in women empowerment. Women need to come out of their shell for a "...the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields"<sup>32</sup>

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